IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 255 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JHENAJI SHANJI BHOI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 255 of 1985

MR JM PANCHAL for Petitioner No. 1

MR KC SHAH, APP for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 15/02/2002

CAV JUDGEMENT

1. The appellant alongwith two other original accused was tried in the Court of Ld. Addl. Sessions Judge, Ahmedabad [Rural} at Narol for offences committed

u/Ss. 304 (2), 323, 323 read with sec. 34 and section 504 of the Indian Penal Code (for short 'IPC'). The case against them was numbered as Sessions Case No. 111 of 1984. The Ld. trial Judge vide judgment dated 26/2/1985 convicted the appellant for offence u/S. 304 Part-II of the IPC and sentenced him to suffer RI for five years and to pay fine of Rs.500/-, in default SI for one month. He was acquitted of other offences. So far two other original accused are concerned, they have been acquitted by the trial Court by giving benefit of doubt. The appellant has, therefore, filed this appeal u/S. 374 (2) of the Code of Criminal Procedure (for short' Cr.P.C.') challenging his order of conviction and sentence passed by the Ld. trial Judge.

2. The facts in short, which can be described as prosecution case, can be stated as under :-

2.1. The incident in question took place on 15th June, 1984 in locality known as Bhoivas in Kanbha village. This locality comprises 8 to 9 houses of persons belonging to Bhoi community. Deceased Punaji Ashaji was resident of this locality. His two younger brothers also stayed in the said locality. Amongst three brothers there is joint Vada land for tethering cattle. The present appellant also resided in the said locality. His house was adjoining to the house of brother of the deceased, namely Dayaji Ashaji. Appellant also owned Vada land which was adjoining to the Vada of deceased and his brothers and both these Vadas were separated by common cactus hedge. The Vada of the appellant was slightly on a higher level than the Vada of the deceased and his brothers.

2.2. On the day of incident at about 5.30 p.m. the appellant who was organizing the cactus hedge which had broken from some places. He was erecting some portion of the hedge by planting cactus and a wooden pole of the height of around 6 ft. The deceased at that time felt that the appellant was encroaching upon their land while erecting the hedge. He, therefore, went and told appellant that he should not encroach upon their Vada land. The appellant, however, ignored the instruction given by the deceased and he instead gave filthy abuses to him. In the meanwhile, appellant's two other brothers who are the original accused, joined him and appellant, therefore, got more excited and he alongwith his brothers started giving abuses. Thereupon, the deceased asked appellant and his brothers not to speak abuses. Appellant, therefore, got enraged and he gave one blow on the head of the deceased by means of a pole meant for

constructing the hedge. The other brothers of the deceased were also assaulted by the appellant and other two brothers and they are alleged to have caused injuries not only to the deceased but to other relatives of the deceased. On receiving the blow on the head, the deceased fell down on the ground and with a view to rescue him, the son and brother of the deceased immediately went and secured help of other relatives. They took the injured inside the house and made him lie on a cot. Brother of the deceased, Dayaji went to inform the police about the incident. The deceased while in injured condition was first taken to the Primary Health Centre at Kanbha and on receiving the advice of the Medical officer on duty there, he was thereafter shifted to the Civil Hospital. At the Civil Hospital deceased was pronounced dead by the Medical officer. The injured relatives of the deceased got themselves treated at the Civil Hospital.

2.3. In the meanwhile the police on duty in the hospital, namely, Police Constable Bahadursinh informed the Shahibaug Police Station regarding the death of the deceased and the said message was received by Purnanand Bhikhabhai, then attached to Shahibaug Police Station. Later on the Police Sub Inspector attached to Unjad Police Station received on 16th June, 1984 all the papers relating to this case from Shahibaug Police Station. He, thereafter, proceeded with further investigation and converted the offence from section 323 to section 302 of the IPC. During the course of investigation, the appellant and other original accused came to be arrested and it was found that they had also received several injuries on different parts of the body. They were also treated medically by the doctor. The Investigating Officer during further investigation arranged to get the post mortem done, the inquest panchnama recorded and took other formal steps to complete the same. On completion of the investigation, he submitted chargesheet in the Court of the Ld. Judicial Magistrate First Class, Ahmedabad [Rural], who in turn committed the case to the Court of Sessions, as offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

3. The Ld. trial Judge framed charge against the appellant and other original accused for offences stated above at Exh. 2 on 25th January, 1985. The appellant and other original accused pleaded not guilty and claimed to be tried.

4. At the trial the prosecution examined 10 witnesses and also relied on documentary evidence such as

inquest panchnama at Exh. 11, the medical certificates of the injuries received by the prosecution witnesses as well as the appellant and other original accused, the post mortem notes, etc. Upon completion of the recording of oral evidence, the appellant and other original accused in their further statements recorded pursuant to the provisions of section 313 of the Cr.P.C. were put all the circumstances appearing against them in the evidence to enable them to render any explanation, if they so desired. However, the same were denied by the appellant and other accused. The appellant has in answer to the last but one question i.e. "Do you wish to say anything else?, he has stated that Dayaji Ashaji, Ravji Puna, Punaji Ashaji and Balaji Punjai came to beat him. He, therefore, gave a push with force to the deceased, as a result of which he fell down on the wooden nail meant to tie cattle. In the meanwhile original accused nos. 2 and 3 came there and they tried to intervene and save appellant. Thereupon Dayaji Ashaji gave a blow with wooden piece to accused no. 2 and Balaji Punaji assaulted Mangaji Shanaji. He has not beaten any one. He has further stated that while he was erecting the hedge inside the boundary of his land, Punaji and Dayaji Ashaji assaulted him. In addition to this, he has also produced written statement which is at Exh. 39.

4.1. Similarly original accused nos. 2 and 3 in their statements stated that when they saw their brother being assaulted, then ran to help him and in the process they also received injuries. According to them, appellant has not caused any injury to any one.

5. That at the conclusion of the trial, the Ld. trial Judge arrived at findings that the prosecution had not been able to prove that appellant had caused injury to the deceased with the intention of causing death or inflicted such injury which may in all probability, result into his death. However, it had proved the case against the appellant to the extent that appellant did have knowledge while inflicting injury on the deceased that such injury may cause his death. The trial Court did not believe rest of the prosecution case against other accused and the appellant. He accordingly convicted and sentenced the appellant as stated above. Hence this appeal.

6. At the hearing of the appeal Mr. J.M. Panchal, learned counsel appearing for the appellant, submitted before me that the order of conviction and sentence passed by the Ld. trial Judge are erroneous in as much as the prosecution has not been able to prove its case

against the appellant even for offence u/S. 304 Part-II of the IPC. He has submitted that the prosecution has suppressed the real facts and it has not come out with true version of the incident. The second limb of his argument is that there is no reliable evidence to show who started the physical assault and in absence thereof, it cannot be safely concluded that the appellant and his brothers were the aggressors and there is all possibility that they may have exercised their right of private defence. He has further submitted that considering the evidence on record and the way in which the whole incident happened, it can safely be said that even if appellant had assaulted the deceased with wooden pole, he may not have any knowledge that it might cause his death.

6.1. He has also submitted that the prosecution witnesses, though opportunity having been given to them during recording of their evidence before the Court, they have chosen not to explain the injuries sustained by the appellant and others. Lastly he has submitted that this appeal deserves to be accepted and the appellant requires to be acquitted of the offence with which he is convicted.

6.2. As against that, Mr. K.C. Shah, Ld. APP appearing for the respondent - State, contended before me that the judgment and order of conviction and sentence passed by the Ld. trial Judge are proper and no interference is required at the hands of this Court. He has submitted that looking to the evidence of eye witnesses examined by the prosecution, it can safely be said that it was the appellant who had inflicted fatal injury on the head of the deceased and, therefore, he has been rightly convicted for offence u/S. 304 Part-II of the IPC. Lastly, he has submitted that the appeal deserves to be dismissed.

7. The learned counsels appearing for both the sides have taken me through the record and proceedings of this case including the oral evidence.

7.1. The prosecution with a view to establish that the deceased died homicidal death, has examined Dr. Dipakkumar Devkarandas Patel P.W.2 Exh. 21. At the relevant time he was working as tutor in Forensic Medicines, B.J. Medical College, Ahmedabad. On 16th June, 1984 he received the dead body of Punaji Ashaji at about 9.00 a.m. and he commenced autopsy at 9.05 a.m. and completed the same at about 10.00 a.m. During the autopsy he noticed following external injuries :-

(1) Abrasion is present below Lt. knee, size 4 cm. x 2 cm.
(2) Abrasion on Rt. side of chest - 5 cm. x 1 cm.
(3) Abrasion is present on Lt. shoulder - size 10.0 cm. x 5.0 cm.
(4) Abrasion is present over the linea and Lt. ear size 3.0 cm. x 2.0 cm.
(5) Abrasion over the dorsum of Rt. therid size 3 cm. x 3 cm.

According to him, the aforesaid injuries did not correspond to the internal injuries suffered by the deceased. He has attributed cause of death due to internal injuries which are described as below :-

(1) There is ecehymosis of scalp with clotted blood is present on Rt. parietal regions size 5.0 cm. x 4 cm. There is a linear fracture extending from the Rt. temporal bone just infront of Rt. ear, if the Rt. parietal bone size 12 cm. x 12 cm. then the middle
(2) There is another linear fracture extending them the middle linear fracture mentioned previously; directing backwards - size 5 cm. Brain is acdematum and congested. There are petechial, haemorrhage all over the brain. There is eahymans over the tip and its interior surface Lt. temporal bone size 4 cm x 4.0 cm.

According to this witness, there was no external injury which corresponded with the internal injuries, which has turned out to be fatal. According to him, all 1 to 5 external injuries mentioned in column no. 17 did not correspond to any of the internal injuries. In his opinion, the injuries suffered by the deceased were sufficient in ordinary course of nature to cause death of a person. In the cross-examination suggestion has been put to him that such injuries can be caused due to fall on a wooden nail meant for tying cattle, to which he has answered in affirmative.

7.2. Over and above this, the prosecution has also relied on the inquest panchnama which indicates that the deceased had suffered injuries over his body. The aforesaid medical evidence shows that deceased had not died a natural death, but it was a homicidal death.

8. The prosecution has examined several eye witnesses to establish the fact of incident which took place on 15th June, 1984. The tenor of their evidence is that appellant while erecting the cactus hedge between

two Vada lands was trying to encroach upon the land of the deceased and his brothers, as a result of that the deceased warned him not to do so. That was, however, not listened to by the appellant and he continued with his work. He also gave abuses to the deceased and when his brothers - two original accused joined him, he even got more excited and all the three started giving abuses to the deceased. When the deceased asked him not to speak abuses, appellant picked up a wooden pole described by the witness as Thambhali or wooden Judiyu and caused one injury on head. When the others tried to intervene to save the deceased, two original accused alongwith the appellant caused injuries to them. As a result of the assault, the deceased fell down on the ground and he was brought inside the house and made to lie on cot and when he was removed to the Civil Hospital, he was pronounced dead. All these witnesses have by and large withstood the cross-examination of the defence counsel. However, they have not explained the injuries sustained by the appellant and other original accused. It may be mentioned here that the appellant had suffered even a punctured wound on the forehead which can be termed as visible bleeding injury. All the accused were examined by Dr. Kamleshbhai Shantilal Shah P.W. 1 Exh. 9 on that very day i.e. 15th June, 1984 at about 8.40 p.m. It is true that at the time when the appellant was examined by this Medical Officer, none of the injuries were found to be bleeding, one but it is a matter of common knowledge that if a person received a punctured wound on any part of his body, the blood is bound to ooze from that wound. The medical certificates pertaining to two persons, namely the appellant and original accused Bhalaji Shanaji have been brought on record at Exhs. 17 and 18.

8.1. Thus, it appears that the incident took place while the appellant was repairing the cactus hedge. This incident was not as a result of any pre-plan by either of the parties. It happened all of a sudden. The initial hot exchange of words, it appears, had later on turned into physical fight involving members of both the parties. In such situation it is difficult to say who was the aggressor and who started first the physical assault on the other. It may also be noted here that barring one injury which unfortunately had turned out to be a fatal injury received by deceased at the hands of the appellant, no injury suffered by any of the members of either parties can be said to be serious injury. It is, therefore, quite possible that in the hubbub of the physical assault on each other the appellant seems to have picked up the wooden piece which had become very

handy as he was erecting the hedge and he appears to have tried to deliver a blow on any part of the body with a view to cause some injury to the deceased. It may also be noted here that blow given by the appellant to the deceased had not even caused any external injury mark on the head of the deceased. From the state of evidence which has come on record coupled with the surrounding circumstances including the fact that appellant and original accused Bhalaji had also received several injuries which have not been explained by the prosecution witnesses, it cannot be said for certain that the appellant had any knowledge that blow given by him may result into the death of the deceased. The incident which otherwise would have been very small incident, had turned into a serious one because of the death of the deceased. In light of such evidence, it becomes doubtful whether the appellant would have any time to think that his action may result into death of some one and with that knowledge he had given the blow to deceased. In my opinion, therefore, the appellant also cannot be attributed with any knowledge of the result of his act which would bring his case u/S. 304 Part-II of the IPC. Since the death has been caused, the case of the appellant may be covered under the last clause of section 320 of the IPC and for that he can be convicted for offence made punishable u/S. 326 of the IPC. The finding of the Ld. trial Court, therefore, to that extent appears to be erroneous. As a result thereof, the conviction of the appellant is converted from one u/S. 304 Part-II to one u/S. 326 of the IPC. Since almost eighteen years have passed from the date of incident, I am not inclined to take strict view in the matter awarding sentence. The learned counsel for the appellant informs that the appellant has spent one and half month in prison. In my opinion, therefore, the ends of justice would meet if the appellant is sentenced to suffer imprisonment already undergone.

9. The appellant, therefore, partly succeeds in this appeal. The appeal is partly allowed. The appellant is now convicted for offence u/S. 326 of the IPC instead of offence u/S. 304 (2) of the IPC and he is sentenced to suffer imprisonment already undergone. The sentence of fine imposed by the trial Court is retained for this offence.

Muddamal articles to be disposed of in terms of the direction given by the Ld. trial Judge in the impugned judgment.

[AKSHAY H. MEHTA, J.]

* Pansala.